United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75—7381

United States Court of Appeals

For the Second Circuit

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs-Appellees,

vs

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York, WILLARD A. GENRICH, a member of the Board of Regents, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York

BRIEF OF DEFENDANTS-APPELLANTS

JOSEPH W. McGOVERN, WILLARD A. GENRICH, BOARD OF REGENTS and DR. EWALD B. NYQUIST

JOHN P. JEHU
Associate Counsel
Attorney for Defendants-Appellants
Joseph W. McGovern, The Board
of Regents of the State of New York
and Dr. Ewald B. Nyquist
State Education Department
Washington Avenue
Albany, New York 12234
(518) 474-6150

ROBERT D. STONE
Counsel and Deputy Commissioner
for Legal Affairs
State Education Department
Washington Avenue
Albany, New York 12234
(518) 474-6400

EDWARD L. ROBINSON
Attorney for Willard A. Genrich
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8443

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
For the Second Circuit

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs-Appellees

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York

BRIEF OF DEFENDANTS-APPELLANTS JOSEPH W. McGOVERN, WILLARD A. GENRICH, BOARD OF REGENTS and DR. EWALD B. NYQUIST

Questions Presented

1. Does not the Court lack jurisdiction over the subject matter where events subsequent to the filing of the complaint have laid the controversy to rest?

2. Does not the Court lack jurisdiction over the subject matter where the complaint fails to present a case or controversy?

3. Does not the Court lack jurisdiction over the persons of all defendants-appellants, where the only real party in

interest is not a "person" within the meaning of 42 U.S.C. §1983 nor of 28 U.S.C. §1343, subdivisions 3 and 4, and none of the other persons named as defendants are anything other than nominal parties?

4. Did not the Court below fail to acquire jurisdiction where venue was laid in the wrong District Court?

5. In any event, does not the complaint herein fail to state a claim upon which relief can be granted?

(The District Court decided all these questions adversely to defendants-appellants.)

Preliminary Statement
(Second Circuit Rules §28)

The decision and order appealed from was rendered by District Judge John T. Curtin of the United States District Court for the Western District, on June 9, 1975. The decision is not as yet reported, but is attached to the brief as Exhibit 1, for the convenience of the Court.

Statement of the Case

The complaint herein, dated February 12, 1975, alleges that the January 22, 1975 educational policy statement of the Board of Regents, set forth in full in paragraph 17 of the complaint is unconstitutional. Named as defendants are Joseph W. McGovern who was Chancellor of the Board of Regents until April 1, 1975; the Board of Regents itself which adopted the contested statement by a vote of nine in favor, four opposed and two members absent; Regent Willard A. Genrich, a member of the Board of Regents residing in the Western District; and Ewald B. Nyquist, Commissioner of Education who is not a member of the Board but serves as its Chief Executive Officer. All persons named are sued "in their official capacity."

The complaint is replete with allegations of conversations among members of the Board of Regents, among members of the Board of Regents and legislators. The complaint alleges basically that it was the intent and effect of the January statement to stop

integration efforts of the Commissioner of Education and the Board of Regents, contrary to their long-standing efforts in that respect.

On February 20 the Board of Regents adopted two further educational policy statements modifying the January statement and making it clear that the January statement was in no way intended to interfere with the judicial powers of the Commissioner of Education. The said February statements further clearly negate the inferences plaintiffs seek to draw - improperly - from the January statement.

On March 11 plaintiffs served notices of deposition against five members of the Board of Regents and the Commissioner of Education, seeking to discover motives, "position" and views of all concerned, communications and contacts between members of the Board of Regents and members of the Legislature, etc.

Defendants did not answer the complaint but moved to dismiss on various grounds: lack of jurisdiction over the subject matter for mootness and failure to state a case of controversy, lack of jurisdiction over the person of any of the persons named as defendants and for insufficiency.

Defendants, in addition, moved in the Northern District for a protective order against the depositions sought by plaintiffs, based on the complete irrelevance of the information sought, the privileged character of the matters sought to be inquired into, as part of the executive and legislative decision-making process; annoyance, harassment and expense of said discovery proceedings and the pendency of the motion to dismiss.

Plaintiffs objected to the venue of the motion for protective order and Judge Foley, upon oral argument, ordered the motion transferred to the Western District.

In the meantime, Judge Curtin dismissed the motions to dismiss by a decision and order dated June 9.

Defendant-appellants thereupon moved for amendment of said decision and order so as to permit appeal under 28 U.S.C. §1292 (b), and on June 23 filed the present notice of appeal.

The Regents' statement of January 22 and February 20, 1975 are here set forth for the convenience of the Court:

> "At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the matter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their immediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents recognize that we should not, in pursuit of that principle, ignore other rational and legally justifiable views of our citizenry.
>
> "The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population.

Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district is making, and has made, a serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district."

Statement of February 20, 1975:

"Our statement of January 22, 1975 clearly indicates that it is made 'in support and in addition to' our statement of policy on October 25, 1974.

"We understand that de jure segregation is not at issue: it is unconstitutional.

"We also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

"To determine compliance with Regents' policy on integration principally by use of quantitative measures is to use a

method which by itself offers no assurance that the educational opportunity of each child is protected.

"Recourse to quantitative measures is not the sole nor necessarily the principal method for determining and maintaining school integration or for detecting and correcting school segregation. There are other ways to measure whether or not a school district makes serious efforts to bring about integration of schools.

"The Regents commit themselves to the following principles:

* The Regents affirm our conviction that equal opportunity for high quality education is the right of every pupil in the public schools of this State, regardless of race, creed, or color.

* The Regents expect every school district to take those steps necessary to enable every pupil to enjoy that primary right, and to provide appropriate appeal procedures for aggrieved pupils and parents.

* The Regents believe that integrated schools are essential to assure that primary right to all pupils residing in racially diverse communities. We define an integrated school as one in which the racial composition of the student body reflects the pupil population of the school district without necessarily attempting to be proportionate to it, and in which the programs, facilities, and equipment are not racially identifiable. What constitutes a reflection of the population of a school district will depend upon the circumstances in specific situations.

* The Regents believe that appropriate means to achieve high quality education for all pupils include, where feasible, strategic location of new schools or closing of unneeded schools or both, optional transfer programs and open enrollment, expansion of magnet and specialized schools, compensatory education programs, curriculums which enhance

interracial understanding, recruitment of qualified faculty from varied racial and ethnic backgrounds, equalization of state aid to school districts, alteration of school attendance zones where necessary, and in some instances, the judicious and reasonable transportation of pupils with due consideration that the health, safety, and access to high quality education of pupils are not imperiled and with particular consideration that children of elementary school age are not transported for more than moderate distances.

* The Regents believe that racial integration in public schools does not necessitate uniform proportions of pupils, by race or ethnic background, in all schools in a district. No single factor - whether it be quality of programs or competence of staff, or adequacy of facilities or racial or ethnic balance--is alone sufficient to assure that the right of every pupil to high quality education in an integrated school will be realized. The reference to "serious effort" in our statement of January 22, 1975 speaks to a combination of these factors without sole reliance on any one method of integration or on any one measure of judging integration."

Second statement of February 20, 1975:

"I move that in the light of our discussions and in light of differences of opinion on this statement, that nothing in any of the Regents policy statements should be or can be construed or interpreted as in any way interfering or restraining the Commissioner's judicial powers in those five cases before him, and that Section 310 remain inviolate in the execution of his judicial functions to proceed forthwith in hearing these five cases."

Jurisdiction

It is respectfully submitted that this Court has full jurisdiction to hear and determine this appeal.

1. It is a basic principle of procedure, that lack of jurisdiction can be raised at any time in any action or proceeding.

Denial of a motion to dismiss is a final determination in the sense that jurisdiction is found to exist. If this aspect of finality were not sufficient as a basis for appeal, the question of jurisdiction could then not be appealed until after a lengthy trial, lengthy and complicated depositions being taken all over the State, with a complete waste of time, money and effort on the part of numerous officials and the part of the Court as well. It would appear in the interest of judicial economy to render such a decision at the earliest possible time, such as here, immediately upon a denial by the District Court of motions to dismiss for lack of jurisdiction on various grounds. Judicial economy would appear to dictate that this most basic issue should be decided before all further efforts on the part of the Courts and the parties are wasted.

2. The Court's denial of defendants-appellants motion to dismiss for lack of jurisdiction, in effect, refuses a permanent injunction against plaintiffs-appellees prosecuting this action at law.

Since the Rules of Civil Procedure, in Rule 1 thereof, provided that the Rules are to "be construed to secure the just

speedy and inexpensive determination of every action", as the United States Supreme Court held in Ettelson and Enelow (infra), the practical effect of finding 28 U.S.C. §1292(a)(1) applicable to the present appeal, is to "in practical effect, terminate the action" (pp. 191,192), provided of course that this Court agrees that the Court below never acquired jurisdiction, as we think it must.

Thus, a finding of the applicability of section 1292 (a)(1) will contribute to the "just, speedy and inexpensive determination" of this action.

It is submitted, therefore, that the Enelow-Ettelson doctrine is applicable and that this Court has jurisdiction to accept this appeal from the judgment and order of the Western District.

Enelow v. N.Y. Life Insurance Co.,
293 U.S. 379

Ettelson v. Metropolitan Life,
317 U.S. 188

Garner Lumber Co. v. Randolph E.
Valens, Lange, Inc., 513 F. 2d 1171

ARGUMENT

POINT I

THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER, THE COMPLAINT HAVING BECOME MOOT.

The sole relief claimed by plaintiffs-appellees is for the Court to declare unconstitutional a certain educational policy statement adopted by the Board of Regents in January of 1975.

The prayer for relief, except for costs and attorneys fees is for "a declaration that the January 22, 1975 policy of the Regents is unconstitutional."

The text of this statement appears under "Statement" above.

Plaintiffs-appellees claim that it was both purpose and effect of that statement to cancel five show cause orders issued by defendant-appellant Nyquist in five pending integration cases, involving the city school districts of the Cities of Buffalo, Lackawanna, Utica, Newburgh and Mount Vernon.

That claim, however, is wholly contrary to the facts.

1. The said January statement was modified by two further statements of the Board of Regents, adopted on February 20, 1975, i.e., after the date of the complaint herein (which is Feb. 12, 1975).

The two statements are set forth in full in the "Statement" above.

These two further statements of educational policy make clear that the purpose and goal of the Regents in urging and promoting reduction of de facto racial imbalance as a matter of educational policy remains unchanged. It is true of course that some of the

means of implementing and administering this policy were modified to some extent. But the thrust of the Regents position remains unchanged and the claims of the complaint have clearly beome moot by the adoption of the said two additional statements by the Regents.

2. The effect of the January statement was not cancellation of the show cause order, but merely postponement thereof for the purpose of adapting the same to the language of the February statement.

3. On February 24, 1975, defendant-appellant Nyquist wrote letters to the presidents of the five boards of education involved in the five show cause orders, explaining to them that he had postponed the same for the said purpose; that he was asking his staff to work with their superintendents of schools and their staffs to develop appropriate recommendations for further action. Copies of these letters are attached hereto as Exhibit 2 .

4. Three of these five postponed show cause orders have in fact been reissued, and arguments thereon were heard on August 14, 1975 for Mount Vernon, and on August 21, 1975 for Newburgh. Final decisions for these two districts are presently in preparation. The third show cause order, for Lackawanna, is scheduled for argument on December 1, 1975.

5. The remaining two districts, Buffalo and Utica, are presently under study so as to accommodate necessary action not only to the

concerns of the February policy statement of the Regents, but partly to the most recent shifts and changes in pupil population in these two city school districts. It is presently anticipated that these two orders will be ready in January and February of 1976, respectively.

6. The import of the postponement of these show cause orders must be considered in the light of the fact that the integration efforts of defendant-appellants date back many years, in some of these five districts:

(a) Buffalo. The first integration order for Buffalo was issued February 15, 1965 (4 Ed. Dept. Rep. 115). Litigation followed (see Offerman v. Nitkowski, 248 F. Supp. 129; affd. 378 F. 2d 22; see also Lee v. Nyquist, 318 F. Supp. 710; affd. 402 U.S. 935 [1971], declaring unconstitutional chapter 342 of the Laws of 1969 which had prohibited the Commissioner's further integration efforts). Continuous efforts were made by the Commissioner to improve the situation. Partial improvements were made from time to time as a result of conferences, further studies, staff efforts and new plans. But the results continued to be less than satisfactory.

Against this lengthy record, it is submitted, that a temporary postponement of the January 14, 1975 show cause order, for the purpose of adjusting the detailed terms thereof to the February, 1975 educational policy statements of the Regents, and for updating of factual bases for the many and complicated details of the order, does not rise to the dignity of a constitutional issue. The

complaint is and remains moot.

(b) Mount Vernon. Another one of these five show cause orders is cited here as an example of the long record of efforts in these matters. Here the first order was made by the Commissioner on December 21, 1965 (5 Ed. Dept. Rep. 85). Further orders followed: April 29, 1966 (5 id. 185); June 13, 1968 (7 id. 145); November 1, 1968 (8 id. 132); and an interim order on October 6, 1971. The matter was continuously litigated over all these years (see 54 Misc 2d 379; 58 Misc 2d 762; 32 A D 2d 985; 60 Misc 2d 928). The legislative prohibition enacted by Laws of 1969, chapter 342, and declared to be unconstitutional by the United States Supreme Court also interfered with developments.

Again, a mere delay of a few months, or even a year, viewed in the context of these sustained efforts, cannot give rise to a substantial federal question, as long as such efforts continue to be maintained, as they indeed have been, and are. As indicated above, the Mount Vernon show cause order was reinstated, and oral argument took place thereon in August, 1975, with the final decision presently pending.

(c) The remaining two such orders are in the process of preparation and are expected to be ready next January and February respectively.

It is submitted therefore that the Court lacks jurisdiction over the subject matter, the sole issue submitted to the consideration of the Court having been laid to rest by subsequent events:

California v. Railroad Co.,
149 U.S. 308, 314

Hall v. Beals, 296 U.S. 45, 48

United States v. Alaska Steamship Co.,
253 U.S. 113, 116

United States v. Hamburg American Line,
239 U.S. 466, 475, 476

Olson v. Allen, 250 F. Supp. 1000;
affd. 367 F. 2d 565

Doremus v. Board of Education,
342 U.S. 429

Powell v. McCormack, 395 U.S. 486

DeFunis v. Odegaard, 416 U.S. 312

POINT II

THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER, THE COMPLAINT FAILING TO PRESENT A CASE OR CONTROVERSY.

1. The January statement of the Regents, against which this complaint is directed, is simply a statement. It is not a rule or regulation having the force of law. It is not a decision which could be enforced against a specific person, corporation or unit of local government. It is simply a statement of educational policy, expressing certain recommendations. Even if the said February statements had not been adopted (which modified and explained the parameters of the January statement - see POINT I, supra) said January statement, apart from being moot, is in any event not self-executing and does not represent action, but is in the nature of opinion.

As such, the statement itself cannot affect plaintiffs-appellees' constitutional rights. Such rights could be affected only by improper action of the two boards of education here involved or by improper action of the Commissioner of Education, or by failure of either of these to act, in contravention of constitutional rights secured to the plaintiffs-appellees. It is only such a secondary effect of the statement, if any, that could affect plaintiffs-appellees interests. Hence, the complaint herein fails to satisfy the requirements of 28 U.S.C. §2201, there being no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Maryland Casualty v. Pacific Coal and Oil Co., 312 U.S. 270, 273

Aetna Life Insurance Co. v. Hayworth, 300 U.S. 227

Massachusetts v. Mellon, 262 U.S. 447

Sellers v. Regents of University of California, 432 F. 2d 493, cert. den. 401 U.S. 981

Golden v. Zwickler, 394 U.S. 103

2. A second barrier to the Courts' jurisdiction appears at this point.

The January statement, as all the other Regents' statements on the subject, do not address themselves to de jure imbalance at all. They address themselves entirely to de facto imbalance.

This is so for the simple reason that the United States Supreme Court has expressed itself clearly and firmly on the subject of de jure segregation and the Regents do not need to add anything to that, nor would it be proper or useful for them to do so. The Regents are of course fully aware of the law and Constitution.

Hence, the various statements address themselves solely to redress of de facto imbalance, caused by housing patterns and various causes other than governmental action, and to educational policy questions involved in such redress.

And it is here that plaintiffs-appellees' case founders against the plain fact that the United States Supreme Court has never held that the United States Constitution requires governmental action of any kind to redress de facto segregation.

The High Court had at least two opportunities to find such a requirement but each time refused to do so. In both these cases the Courts of Appeals (of the Seventh and Tenth Circuit respectively) specifically stated that there was no constitutional requirement for governmental action to counteract de facto segregation, and in both cases certiorari was denied:

> Bell v. School City of Gary, Indiana, 324 F. 2d 209; cert. den. 377 U.S. 924
>
> Downs v. Board of Education of Kansas City, 336 F. 2d 988; cert. den. 380 U.S. 914

Since none of the Regents' statements on the subject, including the January statement, address themselves to de jure

segregation, but are entirely limited to de facto, or "adventitious" imbalance, even complete silence of the Regents on the subject would not and could not raise substantial constitutional questions.

It is for this additional reason, that the complaint herein fails to present a case or controversy, and hence the Court lacks jurisdiction for this reason as well.

POINT III

THE COURT LACKS JURISDICTION OVER THE PERSONS OF ANY OF THE DEFENDANTS-APPELLANTS.

The sole question which the complaint purports to bring before the Court for adjudication, is the constitutionality, or lack thereof, of the January 22, 1975 educational policy statement of the fifteen-member Board of Regents.

There are no questions of fact involved here (except in relation to the matter of mootness - see POINT I, supra).

The contested statement must stand or fall of its own content, under the present complaint.

The statement was adopted, not by any single member of the Board of Regents, but by a majority vote of the whole Board, nine members voting in favor, four members opposed and two members absent.

The complaint lists (1) the Board of Regents, (2) former Chancellor McGovern, (3) Commissioner Nyquist, and (4) Regent Genrich, as defendants.

It is submitted that the Court lacks jurisdiction over any of these four defendants, non of whom have ever waived the defense of lack of jurisdiction over their persons.

1. The Board of Regents. The Board of Regents is not a "person" within the meaning of 42 U.S.C. §1983, nor of 28 U.S.C. 1343, subdivision 3 and 4, which are claimed as bases for jurisdiction of the Court. Since the Board as such is not a "person", the Court cannot and did not acquire jurisdiction over the cause at bar. Such lack of jurisdiction has never been waived by any defendant-appellant, but has been urged immediately and consistently as basis for dismissal of the complaint.

Brault v. Town of Milton,
____F.2d__ [Feb. 24, 1975]

City of Kenosha v. Bruno,
412 U.S. 507, 513

Monroe v. Pape, 365 U.S. 167,
187-192

Sellers v. Regents, 432 F. 2d 493;
cert. den. 401 U.S. 981

Bennett v. Peo. of California,
406 F. 2d 36; cert. den. 394
U.S. 966

Allison v. California Adult
Authority, 419 F. 2d 822

Clark v. Washington, 366 F. 2d 678

The Board of Regents is not a "person" within the meaning of 42 U.S.C. 1983, which is the only jurisdictional basis pleaded by the plaintiffs, but is "the educational arm" of the State, and the State is not a person within the meaning of that jurisdictional provision.

Zuckerman v. Appellate Division,
421 F. 2d 625

Williford v. California,
352 F. 2d 474

(Both of these cite Monroe v. Pape, 365 U.S. 167 referred to above.)

Hence, the Court clearly lacks jurisdiction over the Board of Regents.

2. Former Chancellor McGovern. Defendant-appellant McGovern is sued in his official capacity, but is not a real party in interest. He did not adopt the statement, being only one of fifteen members on the Board of Regents. In fact, he voted against the January statement. Hence, plaintiffs-appellees can have no conceivable basis for naming him as a defendant. The complaint and action against defendant-appellant McGovern must be dismissed for lack of jurisdiction over his person.

3. Commissioner Nyquist. Defendant-appellant Nyquist is also named in his official capacity. He, likewise, is not a real party in interest. He did not adopt the January 1975 - or any other similar - statement of the Board of Regents. He is not even a member of the Board. He merely serves as the Chief Executive Officer of the Board of Regents. But he has no vote nor even a seat on the Board. He serves at the pleasure of the Board (see Education Law §§101, 301-305).

It is appropriate at this point to refer to the distinction between the administrative and judicial functions of the Commissioner of Education. Since 1822, Commissioners of Education and their predecessors in office (superintendents of common

schools 1822-1854; superintendents of public instruction 1854-1904) have had judicial powers over the State's school system. In that capacity, which is largely of an appellate nature, the Commissioner decides questions of law and fact under Education Law §310-312, under a procedure involving two or more contending parties with the submission of verified pleadings, affidavits of service, briefs and oral argument. As to these decisions, the Commissioner is not responsible in any way to the Board of Regents. Through these decisions he must enforce the law as it exists under State and Federal legislation and as it has been interpreted by the State and Federal Courts.

When it comes to questions of educational policy, however, as distinguished from questions of law, the Commissioner of Education is subject to the rule-making power of the Board of Regents and must carry out their policy directives.

In any event, defendant-appellant Nyquist is not a proper party defendant and the Court did not and cannot acquire jurisdiction over his person, nor has defendant-appellant Nyquist waived this defense of lack of jurisdiction in personam. It is submitted that the complaint and action as against this defendant-appellant must also be dismissed.

4. Regent Genrich. Defendant-appellant Genrich, likewise, is served only in his official capacity (complaint, par. 3, sub-par. (b)). Regent Genrich, likewise, did not adopt the contested January statement, any more than defendant-appellant McGovern.

It is a statement of a fifteen-member Board, adopted by a vote of 9-4 with two members absent. Regent Genrich was one of the nine members of the Board voting in favor of the adoption of the January statement; and yet he is the only one of these nine members who was named as a defendant. It is submitted that the sole purpose of naming this single member of the majority of the Board was to claim venue in the United States District Court for the Western District of New York, Regent Genrich being the only member of the Board who resides in that district.

It is submitted, however, that Regent Genrich, likewise, is merely a nominal party and is not in fact a proper party defendant herein.

Judge Curtin, it is submitted, improperly rejected defendants-appellants' objection to jurisdiction over the person of Regent Genrich on these grounds, by the following statement:

> "In this case the defendant Genrich, as a resident of the Western District of New York is sued individually and by virtue of the office he holds. It is alleged that he is unlawfully threatening to perform an act which is in violation of his official duties."

This statement in the decision and order of the Court below, it is submitted, is reversible error for four reasons:

(a) ". . . is sued individually and by virtue of the office he holds" (emphasis supplied).

The complaint, in paragraph 3 entitled "Defendants", states in subparagraph (b) thereof:

> "Defendant Willard A. Genrich is a member of the Board of Regents and a resident of the Buffalo area, in Buffalo, New York. He is sued in his official capacity" (emphasis supplied).

There is, therefore, no basis in the record for the Court's statement that Regent Genrich "is sued individually".

Since, therefore, the complaint is limited to Regent Genrich as a member of a board of public officers, he must remain clothed with executive privilege and immunity. The whole principal of suing public bodies via individual members is based on the theory that, while they cannot be touched in their official capacity, they lose their executive privilege and immunity, if and to the extent that they violate the law or Constitution, such violation being perforce outside their official function and they thus become individual malfeasants and therefore subject to being sued as individuals.

Regent Genrich, however, is not being sued in his individual capacity and the said theory of a basis for jurisdiction cannot apply to him for this reason alone.

(b) The Court below further stated:

> "It is alleged that he is unlawfully threatening to perform an act which is in violation of his official duties" (emphasis supplied).

This statement, likewise, is reversible error. The sole question submitted by plaintiffs-appellees is whether or not the January 1975 statement is, or is not, unconstitutional. That question relates backward to the past only and does not relate in any way to the future.

There are no allegations in the complaint that Regent Genrich is "threatening to" do anything. "Threat" means the undertaking

to do something in the future; the complaint however is cast entirely in the past.

Hence, jurisdiction of the Court over Regent Genrich as an individual cannot be found under any theory advanced by the Court below.

(c) The said statement of the Court below, further, refers to "threatening to perform an act which is in violation of his official duties" (emphasis supplied).

This part of the statement, likewise, is in error. As pointed out in POINT II, paragraph 2, supra, the contested statement does not address itself to any de jure segregation problem, but is limited entirely to de facto situations. As indicated there, even if the Board of Regents had made no statement at all on the subject, there would be no violation of the Constitution involved. Nor is there any violation of the Constitution involved in this statement as actually adopted in January, 1975, since the United States Supreme Court has at least twice refused to hold that any requirement for governmental action to reduce de facto segregation exists.

How, then, can a constitutional violation be found in a member of a fifteen-member public body voting in favor of a resolution addressed solely to de facto problems of educational policy, and more particularly addressed to specific means and details of the manner of attacking the problem of de facto racial imbalance, the desirability of which attack is expressly affirmed by that very statement?

(d) The decisions cited by the Court below in support of the finding of personal jurisdiction over Regent Genrich, it is submitted, are inapplicable to the participation of a member of a fifteen-member legislative body, in the legislative deliberations of that body, leading to the adoption of a policy statement, which is essentially in the nature of an opinion, as set forth above.

5. It is therefore submitted that the Court did not and could not acquire jurisdiction of any of the named defendants herein, none of them have ever waived that defense, and that therefore the decision below must be reversed and the complaint must be dismissed for lack of jurisdiction over the persons of any of the named defendants.

POINT IV

THE COURT BELOW LACKED JURISDICTION BECAUSE OF IMPROPER VENUE, IN ANY EVENT.

The sole issue here is the constitutionality of a statement adopted by the entire Board of Regents.

Since no individual member of that Board would or could adopt that statement, the only proper party, i.e., the only real party in interest, would be the Board of Regents, i.e., the entire Board rather than individual members thereof.

The office and therefore the "residence" of the Board of Regents, for the purpose of 21 U.S.C. §1391(b), is Albany which is in the

Northern District and plaintiffs-appellees have named Regent Genrich for the sole purpose of claiming venue in the Western District. Since, however, as pointed out above, Regent Genrich is not a real party in interest, is not a proper party but merely a nominal party, his residence in the Western District cannot be utilized for venue purposes.

Hammer v. Robertson, 291 F. 656

Butterworth v. Hill, 114 U.S. 128

The reference of the Court below to 228 U.S.C. §1392(a) is inapposite, because there can, by the very nature of this case, be only one proper defendant, i.e., the Board of Regents. With only one possible defendant the provisions of section 1392(a) become inapplicable.

Consequently, the United States District Court for the Western District of New York did not and could not acquire jurisdiction and the complaint herein must be dismissed for this reason as well.

POINT V

EVEN IF THE COURT HAD JURISDICTION, THE COMPLAINT WOULD HAVE TO BE DISMISSED FOR INSUFFICIENCY IN ANY EVENT.

Even if jurisdiction were to exist - which is emphatically denied for the reasons set forth in POINTS I through IV, supra - the complaint herein would still need to be dismissed because it fails to state a claim upon which relief can be granted.

1. Events subsequent to the service and filing of the complaint herein, including two later statements by the Board of Regents on the same subject, show conclusively that the January statement d i d not have the claimed effect of stopping all integration efforts relating to de facto imbalance cases. In fact, three of the five show cause orders have since been reinstated and work on the other two is proceeding apace. Nor can a comparatively slight delay in proceedings and efforts going back more than ten years in some cases, rise to the dignity of a constitutional issue.

2. The contested statement raises no substantial federal question. It does not relate to de jure segregation matters but addresses itself to the manner and means of combatting de facto situations as a matter of educational policy, and to some of the detailed factors involved in carrying out the affirmed policy and the means of doing so.

3. It is footless to allege conversations among members of the Board of Regents, among such members and members of the Legislature and then to allege that such conversations have a bearing on a purely legal question, i.e., whether or not a specific statement the full text of which was and is before the Court does or does not violate the Constitution.

4. Consequently, even if jurisdiction could be found to exist, the complaint would have to be dismissed for insufficiency.

CONCLUSION

FOR ALL THE FOREGOING REASONS THE DECISION AND ORDER BELOW SHOULD BE REVERSED AND THE COMPLAINT DISMISSED.

Reversal and dismissal of the action and complaint herein will contribute to the solution of the educational problem to which the continued Regents' policy is directed. Quite apart from the purely legal considerations set forth in POINTS I through V hereof, it is submitted that continuation of this litigation with the taking of depositions intended by plaintiffs-appellees on questions which are completely irrelevant as a matter of law to the issues sought to be raised, will simply lead to polarization and confrontation of opposing views with no possible benefit to the children involved.

In the language of Judge Aldrich of the First Circuit referring to the choice between litigation and allowing the educational authorities to accomplish the mutually desired goal by their own efforts, "application of a stick is hardly encouragement to egglaying proclivities however golden".

It is submitted that for all the foregoing reasons the decision and order of the Court below must be reversed and the action and complaint herein must be dismissed.

Respectfully submitted,

JOHN P. JEHU
Associate Counsel
Attorney for Defendants-Appellants
Joseph W. McGovern, The Board of
Regents of the State of New York
and Dr. Ewald B. Nyquist
State Education Department
Washington Avenue
Albany, New York 12234
(518) 474-6150

EDWARD L. ROBINSON
Attorney for Willard A. Genrich
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8443

ROBERT D. STONE
Counsel and Deputy Commissioner
for Legal Affairs
State Education Department
Washington Avenue
Albany, New York 12234
(518)474-6400

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, et al.,

Plaintiffs

v. Civ-75-74

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York, et al.,

Defendants

DECISION
and
ORDER

CURTIN, DISTRICT JUDGE

EXHIBIT I

E-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs

v. Civ-75-74

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants

APPEARANCES: HERMAN SCHWARTZ, ESQ., Amherst, New York
and
NATHANIEL JONES, ESQ., New York, New York
and
GEORGE M. HEZEL, ESQ. and STUART R. COHEN, ESQ., Lackawanna, New York
for the Plaintiffs.

ROBERT D. STONE, ESQ. and JOHN P. JEHU, ESQ., Albany, New York, for Defendants Joseph W. McGovern, The Board of Regents of the State of New York and Dr. Ewald B. Nyquist.

EDWARD L. ROBINSON, ESQ., Buffalo, New York, for Defendant Willard A. Genrich

The complaint alleges an action under the Civil Rights Act, 42 U.S.C. § 1983. The plaintiffs, residents

of the Cities of Lackawanna and Buffalo, bring this action to declare unconstitutional a policy statement of the Board of Regents of the State of New York which they allege has the purpose and effect of preventing the New York State Commissioner of Education from fulfilling his statutory and constitutional duty to desegregate the public schools of the State of New York. The plaintiffs in this case are appellants in cases pending before the Board of Regents seeking orders directing the Cities of Lackawanna and Buffalo to end discrimination in their schools. In January 1975, orders were issued by the Commissioner, returnable in February, directing the Boards of Education of Buffalo and Lackawanna to show cause why prior plans of integration should not be implemented. On January 14th, the Commissioner issued similar orders directed to the public schools of Utica, Newburgh and Mount Vernon.

The complaint charges that in 1974, after four new Regents were appointed, they sought to induce the Board to retreat from its prior policy favoring integration of the schools. Finally, on October 25, 1974, a new statement was issued which repeated the Regent's prior policy but agreed that under certain circumstances

parents ought to be able to employ grievance procedures if transportation would have a detrimental effect upon the health and safety of their children. After the issuance of the show cause orders in January, the Regents issued another policy statement on January 22, 1975, which reads as follows:

> At a time when social changes in our society are both rapid and radical, it is important that public officials be sensitive and compassionate in their deliberations and decisions. The Regents are aware that in the matter of racial integration in the public schools of the State of New York there is at issue not only the development of young people but also their immediate and continuing welfare. The social and political ideals that inform American society command us to adhere to the principle that it is desirable for persons of different ethnic origins to conduct their education together. Yet the Regents recognize that we should not, in pursuit of that principle, ignore other rational and legally justifiable views of our citizenry.
>
> The Regents have recently stated their policy on the desirability of the integration of public schools. They here affirm, in support and in addition to that statement of policy, that their view of integration is not based on quantitative measures of school population. Integration does not, by definition, require that racial quotas be used in determining the proper or desirable composition of population within a school. If a school district

> is making, and has made, a serious effort to bring about equal opportunity for learning amongst its students, including the opportunity for children of various ethnic groups to intermingle and to share a common learning environment, then the Regents maintain that the population of a school within a school district need not be required to be comprised by, or be measured by, ratios or quotas of white to black (or Hispanic) students. The Regents expect that if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins. In short, racial integration does not, in the Regents' statement of policy, imply quantitative racial balance in all schools within a district.

The statement was adopted by a vote of nine in favor, four opposed, with two members absent. Defendant Willard A. Genrich voted in favor of the statement and Chancellor Joseph W. McGovern, against. Defendant Dr. Ewald B. Nyquist is not a member of the Board of Regents and could not, and did not, vote on the statement. He serves at the pleasure of the Board of Regents who may dismiss him at any time should he disobey their policies.

The complaint charges that the purpose of the statement was to prevent the Commissioner from proceeding

with efforts to integrate the public schools in the cases of the five cities in which he had issued show cause orders. It seeks a declaratory judgment that the policy statement of January 22, 1975, be held unconstitutional.

The defendants have filed a motion to dismiss the complaint stressing a number of grounds. First, that the court lacks jurisdiction over the subject matter because the facts presented do not present a case or controversy and the issue has become moot because of the adoption of two further policy statements by the Board of Regents clarifying the January statement. The defense moves to dismiss pursuant to Rule 12(b)(6) for failure of the complaint to state a claim upon which relief can be granted. Secondly, the defendants urge that the court does not have jurisdiction over the persons of the defendants, and, finally, that venue is not properly in this district.

Several affidavits have been filed in support of the motions. It appears that following the January 22d statement, the Board issued a further statement on February 20, 1975. According to the defense, the February 20th statement makes clear that

states a cause of action which, at this stage of the litigation, ought not to be dismissed. In addition, because the record has been supplemented by affidavits submitted by the defendants, the motion may be considered as one for summary judgment pursuant to Rule 56. But the information supplied does not afford relief to the defendants because plaintiffs maintain that the impact of the January statement continues, pointing out that the Commissioner has not reinstated the show cause orders.

The defense argument that the court does not have personal jurisdiction of the defendants is without merit. All individual defendants are residents of the State of New York. Numerous cases under 42 U.S.C. § 1983 have been brought against school boards and boards of regents similar to the Board of Regents of the State of New York and against individual members of such boards. See Adams v. City of Colorado Springs, 308 F. Supp. 1397, 1401 (D. Colo. 1970); Lee v. Bd. of Regents of State Colleges, 441 F.2d 1257 (7th Cir. 1971) and James v. W. Va. Bd. of Regents, 322 F. Supp. 217 (E.D. W.Va. 1971), aff'd, 448 F.2d 785 (4th Cir. 1971).

no possible inference should be made that the January statement was intended to interfere with the judicial power of the Commissioner to deal with segregation in the schools. For this reason, defendants urge the policy of the Board is in keeping with the Constitution and the decisions of the Supreme Court. Plaintiffs simply urge the fact that the statement of the Board has had the effect of preventing action by the Commissioner. The orders to show cause have not been reinstated to date.

Because the complaint alleges that the policy statement had had the effect of preventing Dr. Nyquist from integrating the schools in the Cities of Buffalo and Lackawanna, it arguably states a cause of action and a motion under Rule 12(b)(6) must be denied. The court has considered the defendants' argument that the January 22d statement of the Board does not deal with constitutional requirements as to the elimination of de jure segregation but only deals with the desirability as a matter of educational policy of achieving racial integration in the public schools. Nevertheless, in the court's view, the complaint, taken as a whole,

Defendants argue that venue is improper because the only defendant who resides in the Western District is Willard A. Genrich who, according to the defense, is a nominal party since he is only one member of the fifteen member Board of Regents.

Under 28 U.S.C. § 1391(a), if jurisdiction is based in whole or in part on the presence of a federal question, suit must be brought in the district where all defendants reside. However, an exception to that rule exists in situations, like the instant one, where multiple defendants reside in different districts in the same state. 28 U.S.C. § 1392(a). To avail themselves of the provisions of § 1392(a), plaintiff's action must be any civil action, not of a local nature. "Local" has traditionally been held to refer to in rem suits. See generally 1 Moore's Federal Practice para. 0.143(2). Section 1392(a) comes into play when multiple defendants who reside in different districts of the same state are proper or necessary or indispensable parties. See 1 Moore's Federal Practice para. 0.143(1), at p. 1456. It has long been recognized that members of a public body are proper parties. See, e.g., McCardle v. Indianapolis Water Co.,

272 U.S. 400 (1926). In this case the defendant Genrich, a resident of the Western District of New York, is sued individually and by virtue of the office he holds. It is alleged that he is unlawfully threatening to perform an act which is in violation of his official duties. He is a proper party. Northern Indiana Public Service Co. v. Public Service Com'n., 1 F. Supp. 296, 298 (N.D. Ind. 1932). Venue was sustained in a prisoner civil rights suit where one defendant was a resident of the Eastern District of Wisconsin and the other a resident of the Western District of Wisconsin. Simply citing § 1392(a) the court stated that venue might be laid in either district. German v. Schmidt, 330 F. Supp. 430 (W.D. Wis. 1971).

All motions by the defendants to dismiss the complaint, urged in the original and in the amended notices, are denied.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: June 9, 1975

Monday
February 24
19 75

Mr. Joseph E. Murphy
President, Board of Education
Room 712 - City Hall
Buffalo, New York 14202

Dear Mr. Murphy:

I know you are aware that I postponed the "show cause" hearing scheduled for February 14, 1975 with respect to the appeal of Yerby Dixon et al in regard to racial imbalance and related subjects. This postponement was occasioned by a revised integration policy statement adopted by the Board of Regents on January 22, 1975 concerning which I asked additional clarification.

Attached is a copy of the Regents policy statement of February 20, 1975 which provided that clarification. Before proceeding further with respect to this appeal, I wish to be certain that any action taken will be consistent with the most recent policy statement of the Regents as well as with the law and other applicable Regents policy in these regards. In accordance with the above I am asking my staff to contact Superintendent Manch and arrange for a further careful cooperative review of school assignment patterns and pertinent programs, particularly relating the details of my January 14, 1975 order to those conditions and the Board of Regents policy statement and to develop appropriate recommendations for further action.

I know you share my concern in achieving effective integration of the Buffalo City Public Schools and that we can continue to count on the cooperation of your Board and staff as we study these matters further. Your assistance and advice will be honestly appreciated.

Faithfully yours,

Ewald B. Nyquist

Attachment
cc: Superintendent Manch

bcc: Chancellor McGovern
Vice Chancellor Black
Messrs. Mobach, Stone, Sheldon, Bitner

EXHIBIT II

E-11

Monday
February 24
19 75

Mr. Robert Connolly
President, Board of Education
500 Martin Road
Lackawanna, New York 14218

Dear Mr. Connolly:

I know you are aware that I postponed the "show cause" hearing scheduled for February 10, 1975 with respect to the appeal of Cleola Mae Sylvers et al in regard to refusal to provide integrated and quality education in the Lackawanna City Schools. This postponement was occasioned by a revised integration policy statement adopted by the Board of Regents on January 22, 1975 concerning which I asked additional clarification.

Attached is a copy of the Regents policy statement of February 20, 1975 which provided that clarification. Before proceeding further with respect to this appeal, I wish to be certain that any action taken will be consistent with the most recent policy statement of the Regents as well as with the law and other applicable Regents policy in these regards. In accordance with the above I am asking my staff to contact Superintendent Madar and arrange for a further careful cooperative review of school assignment patterns and pertinent programs, particularly relating the direction of my April 3, 1974 order as amplified by my further January 14, 1975 order to those conditions and the Board of Regents policy statement and to develop appropriate recommendations for further action.

I know you share my concern in achieving effective integration of the Lackawanna Public Schools and that we can continue to count on the cooperation of your Board and staff as we study these matters further. Your assistance and advice will be honestly appreciated.

Faithfully yours,

Ewald B. Nyquist

Attachment
cc: Superintendent Madar
bcc: Chancellor McGovern
Vice Chancellor Black
Messrs. Ambach, Stone, Sheldon, Bitner

Monday
February 24
19 75

Col. John P. DeBellis
President, Board of Education
165 North Columbus Avenue
Mount Vernon, New York 10550

Dear Col. DeBellis:

I know you are aware that I postponed the "show cause" hearing scheduled for February 7, 1975 with respect to the appeal of Jeffrey Lloyd King et al in regard to racial imbalance and the failure to provide equal educational opportunity in the Mount Vernon schools. This postponement was occasioned by a revised integration policy statement adopted by the Board of Regents on January 22, 1975 concerning which I asked additional clarification.

Attached is a copy of the Regents policy statement of February 20, 1975 which provided that clarification. Before proceeding further with respect to this appeal, I wish to be certain that any action taken will be consistent with the most recent policy statement of the Regents as well as with the law and other applicable Regents policy in these regards. In accordance with the above I am asking my staff to contact Superintendent Prattella and arrange for a further careful cooperative review of school assignment patterns and pertinent programs, particularly relating the direction of the order of then Commissioner James E. Allen, Jr. of June 13, 1963 as amplified by my order of January 14, 1975 to those conditions and the Board of Regents policy statement and to develop appropriate recommendations for further action.

I know you share my concern in achieving effective integration of the Mount Vernon Public Schools and that we can continue to count on the cooperation of your Board and staff as we study these matters further. Your assistance and advice will be honestly appreciated.

Faithfully yours,

Ewald B. Nyquist

Attachment
cc: Superintendent Prattella
bcc: Chancellor McGovern
Vice Chancellor Black
Messrs. Ambach, Stone, Sheldon, Bitner

Monday
February 24
19 75

Mr. Joseph Hobaica
President, Board of Education
13 Elizabeth Street
Utica, New York 13501

Dear Mr. Hobaica:

I know you are aware that I postponed the "show cause" hearing scheduled for February 3, 1975 with respect to the appeals of Franklin J. Upthegrove and Henry Savage with regard to racial imbalance in the schools of Utica. This postponement was occasioned by a revised integration policy statement adopted by the Board of Regents on January 22, 1975 concerning which I asked additional clarification.

Attached is a copy of the Regents policy statement of February 20, 1975 which provided that clarification. Before proceeding further with respect to these appeals, I wish to be certain that any action taken will be consistent with the most recent policy statement of the Regents as well as with the law and other applicable Regents policy in these regards. In accordance with the above I am asking my staff to contact Superintendent Perry and arrange for a further careful cooperative review of school assignment patterns and pertinent programs, particularly relating the details of my March 22, 1974 order to those conditions and the Board of Regents policy statement and to develop appropriate recommendations for further action.

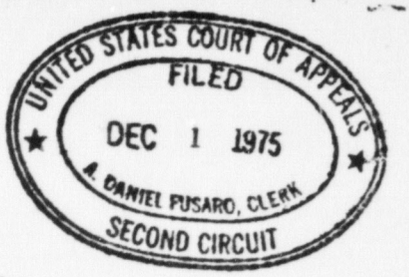
I know you share my concern in achieving effective integration of the Utica Public Schools and that we can continue to count on the cooperation of your Board and staff as we study these matters further. Your assistance and advice will be honestly appreciated.

Faithfully yours,

Ewald B. Nyquist

Attachment
cc: Superintendent Perry
bcc: Chancellor McGovern
Vice Chancellor Black
Messrs. Ambach, Stone, Sheldon, Bitner

E-14



UNITED STATES COURT OF APPEALS
For the Second Circuit

MARY ANDERSON, MAZELL PEOPLES, CHRISTINE JAMES, ANNIE BARNES, CHRISTINE PEYTON, FRANCINE TOLLIVER, ELIZABETH MINNIEFIELD, YVONNE HENLEY, ANN SCRUGGS, BLANCHE THOMAS and EVELYN PERKINS,

Plaintiffs-Appellees,

-vs-

JOSEPH W. McGOVERN, Chancellor of the Board of Regents of the State of New York; WILLARD A. GENRICH, a member of the Board of Regents; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; and DR. EWALD B. NYQUIST, Commissioner of Education of the State of New York,

Defendants-Appellants.

75-1381

I, JOHN P. JEHU, attorney for defendants-appellants in the above-entitled action, hereby certify that, on November 24, 1975 I caused to be served two copies each of the defendants-appellants brief and one copy each of the joint appendix, on Stuart R. Cohen, Esq., and George M. Hezel, Esq., and on Nathaniel Jones, Esq., attorneys for plaintiffs-appellees, by depositing the same in the United States mail, postpaid, addressed to Stuart R. Cohen, Esq. and George M. Hezel, Esq., at the office of the Legal Aid Bureau of Buffalo, 281 Ridge Road, Lackawanna, New York 14218 and to Nathaniel Jones, Esq., N.A.A.C.P., 1790 Broadway, New York, New York 10019, the same being, respectively, their last known addresses.

JOHN P. JEHU
Attorney for Defendants-Appellants

DATED: November 28, 1975

TO: HON. A. DANIEL FUSARO
Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square, New York 10007